Filed 4/22/19 Myhand v. Orange Coast Auto Group CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

TAURUS MYHAND et al.,	
Plaintiffs and Appellants,	G055997
v.	(Super. Ct. No. 30-2013-00667089)
ORANGE COAST AUTO GROUP et al.,	O P I N I O N
Defendants and Respondents.	

Appeal from an order of the Superior Court of Orange County, William D. Claster, Judge. Affirmed.

Rosner, Barry & Babbitt, Hallen D. Rosner, Christopher P. Barry and Arlyn L. Escalante for Appellants Taurus Myhand and Nastassia Myhand.

Callahan, Thompson, Sherman & Caudill, Robert W. Thompson, and Thomas R. O'Connor for Respondents, Orange Coast Auto Group and Travelers Casualty and Surety Company of America.

Severson & Werson, Jan T. Chilton, John B. Sullivan, Erik Kemp and Adam A. Hutchinson for Respondents, Ally Financial Inc. and Gateway One Lending & Finance.

* * *

Plaintiffs Taurus and Natassia Myhand appeal from the order denying their motion for class certification in a putative class action against a car dealership and two financing companies. The trial court concluded the case was unsuitable for class action treatment because plaintiffs failed to prove common issues predominate. (See *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*).) Plaintiffs challenge this finding of lack of commonality as unsupported by substantial evidence and, further, as based on improper criteria and erroneous legal assumptions. We find no merit to these arguments and, consequently, affirm.

I

BACKGROUND

The Myhands filed a putative class action lawsuit against Orange Coast Auto Group and two car loan financing companies (collectively, Orange Coast) on behalf of themselves and other similarly situated consumers who had purchased a new car from Orange Coast using as part of the purchase price a trade-in car on which they still owed money. Plaintiffs alleged that in these purchase transactions, Orange Coast artificially inflated the amount owing on the trade-in car by asking for and inputting on the retail installment sale contract at line 6B ("Less Prior Credit or Lease Balance") the loan *payoff* amount rather than the *balance* owed as of the trade-in date.

Plaintiffs contended the payoff amount included future interest — typically 10-15 days' worth — that was not due on the date of the trade-in. Plaintiffs argued that by inflating the amount owed on the trade-in, Orange Coast reduced the trade-in value, forcing the customer to borrow more for the new car and, thus, pay more in finance charges over the life of the new car loan.

The operative fourth amended complaint stated class claims against Orange Coast for violations of the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.) (CLRA) and the Unfair Competition Law (Bus. & Prof. Code, §§ 17200 et seq.) (UCL), alleging the car dealer's routine practice of disclosing on a sales contract a trade-in

vehicle's "future payoff" rather than the current "balance" violates Civil Code section 2982, subdivision (a)(6)(B), of the Automobile Sales Finance Act and, by extension, the CLRA and UCL. The complaint sought statutory damages and compensatory damages for the overcharges on class members' sales contracts.

A. The Motion for Class Certification

In October 2016, plaintiffs moved for class certification. They sought to certify a class defined, after some later revision, as all persons who, between August 6, 2009, and August 6, 2013, purchased a vehicle from Orange Coast for personal use pursuant to a retail installment sale contract (RISC), and who used as part of the down payment toward the new vehicle a trade-in vehicle that was subject to a prior lien for which Orange Coast obtained a "'*payoff' amount . . . for a future date*," and whose RISC for the new vehicle, prepared by Orange Coast, "included a prior credit or lease balance due and owing" for the trade-in vehicle. (Italics added.)

As for the "commonality" element of class certification, the only element at issue in this appeal, plaintiffs' motion argued the attached excerpts of deposition testimony of two former Orange Coast finance managers proved the dealer had a uniform practice of asking for the "payoff" when customers traded in their vehicles, and then input the payoff on line 6B of the RISC, rather than the statutorily mandated "balance." Plaintiffs argued that in light of this uniform practice, Orange Coast's liability for violating the CLRA and the UCL was subject to common proof among all class members, thereby satisfying the certification element of commonality.

Orange Coast's opposition disputed plaintiffs' evidence of a "uniform practice" for inputting trade-in loan balances, arguing that other deposition testimony of those same former finance managers proved they had no personal involvement in or knowledge of the procedures followed in requesting trade-in balances. Orange Coast submitted declarations from three other former employees, each of whom had been directly responsible for obtaining trade-in balances during the class period. Orange Coast

argued these three declarations proved the company had no uniform practice for obtaining and inputting a customer's trade-in balance.

According to these three supporting declarations, Orange Coast did not know the amount a customer owed on a trade-in vehicle and relied variously on the customer, the lienholder, or some other source, such as an online system called RouteOne to provide the balance information. Orange Coast argued it "has no way to determine whether the trade-in balance listed on any particular RISC was the trade-in balance as of that day or was overstated" and only the prior lienholder could confirm the balance on the trade-in date. Thus, Orange Coast argued, plaintiffs' theory for holding Orange Coast liable for class violations of the CLRA and the UCL was not subject to common proof. Instead, individual issues predominated, making the case inappropriate for class action treatment.

In their reply, plaintiffs repeated their argument Orange Coast had a uniform policy of requesting future payoffs rather than balances, and moved to strike the three declarations Orange Coast proffered, complaining Orange Coast failed to identify these three former employees as persons knowledgeable on dealership practices.

B. Additional Discovery and Supplemental Briefing

The trial court continued the certification hearing to allow additional discovery and supplemental briefing on the "ascertainability and commonality elements of class certification," citing as the "primary reason for the continuance . . . conflicting evidence with respect to whether there was truly a common practice for filling in line 6.B for an ascertainable group of consumers."

Plaintiffs deposed the three former dealership employees whose declarations Orange Coast had submitted in opposition to the certification motion. In its supplemental briefing, Orange Coast pointed to excerpts of these employees' deposition testimony proving they did not share plaintiffs' understanding of the distinction between "payoffs" and "balances" when filling in line 6B of the RISC.

Two of these former Orange Coast employees, Mueller and Jackson, believed "payoff" and "balance" were interchangeable terms that meant the amount owed on a trade-in vehicle on the day they requested the information. The third former employee, Whitehead, thought the two terms had distinct meanings; Whitehead understood "balance" to mean "the amount owed at the time that you make the inquiry," and he thought "payoff" was "an amount that a lender is giving you that would pay all that is owed . . . as of a certain date so that it would include possibly fees or additional interest[.]"

After receiving this first round of supplemental briefing, the trial court again continued the hearing, finding that "[t]he parties' supplemental briefing does not satisfactorily address the commonality element—one way or the other. In a nutshell, the finance and sales employees offer conflicting accounts of Orange Coast's policies and practices, and their declarations and deposition testimony paint an incomplete picture of how Orange Coast processed their retail installment sales contracts ('the Contracts') involving a trade-in vehicle. Thus, it appears to the Court that a better way to determine whether Orange Coast had a practice of using a future payoff date in its [RISCs] is by a review of a sampling of the records themselves."

At that point in the case, the trial court felt sure the deal files held the key to both ascertainability and commonality. The court stated in its minute order: "It also appears that potential class members can be readily ascertained by reference to Orange Coast's records (i.e.[,] the Contracts, coupled with the checks (or other documentation) issued by Orange Coast to the lender to pay off the Trade-In Vehicle). In other words, the fact that the balance amount in the Contract is the same or substantially similar to the actual check amount (which presumably is issued in the future and includes interest accrued as of that date or later) would indicate the amount listed in the Contract is a future 'payoff' amount and not the actual amount owed as of the date of the Contract."

The court further noted, "If the amount of the check were less than the amount stated in the contract, then that would show that Orange Coast used a future payoff amount in the contract . . . [¶] If the amount of the check were substantially larger than the amount listed in the Contract, then that would tend to show that Orange Coast inputted the current balance amount in the contract."

As for commonality, the court observed that "[t]he Mueller, Jackson and Whitehead Declarations tend to refute Plaintiffs' contention that Orange Coast had a common practice of including the future balance payoff. They show that at least some Orange Coast employees used different means to obtain a payoff amount, but they fall short of persuading the Court that Orange Coast did not routinely seek or obtain a future payoff amount. At the end of the day, the conflicting memories of former and current employees regarding a practice that occurred [four]-[eight] years ago may not be the best evidence of whether or not a practice occurred. Documents and numbers, however, are less susceptible to change. For these reasons, a continuance is appropriate to allow Plaintiffs to review a sampling of Orange Coast's records . . . to attempt to show that, notwithstanding the testimony of some sales managers, Orange Coast in fact routinely inputted the same amount for item 6.B in the Contract as was later paid out to the lienholder."

Following the court's order, the parties agreed upon a sampling procedure involving a total of 249 deal files selected by plaintiffs at random.

C. The Trial Court Ruling Denying Class Certification

After hearing argument and taking the matter briefly under submission, the trial court issued a minute order denying the motion for class certification. As is quickly apparent, the sampling of the deal files played a significant role in the court's determination the case is not suitable for class action treatment.

The minute order began by noting that if "Orange Coast had a policy of requesting future 'payoffs' (as opposed to the actual current balance due) from lenders on

trade-in vehicles when filling in Line 6B of the Retail Installment Sales Contract . . . then presumably the class action requirements of commonality and ascertainability could be satisfied."

The trial court then noted the deal files "reviewed by the parties reveal a mixed pattern. For 38 percent of this sample, since the amounts of the checks issued to the lenders were essentially the same as the amounts on Line 6B, and since those checks were always issued a number of days after the Sales Contract was signed," the court found it reasonable "to assume the amounts on line 6B were future payoff amounts and not the balance due. As it turns out, however, on a number of these deals . . . the amount of the issued check did not reflect the balance due,[1] thereby raising a question as to whether the amount on Line 6B was actually a future payoff amount. As Orange Coast points out, "the only way to confirm the actual balance owed on the date a given Sales Contract was signed is via discovery from the lender."

"More to the point, approximately 45 [percent] of the sample files include checks from Orange Coast that *exceeded* the amount on Line 6B. This evidence would suggest that the amount on Line 6B may not have been a future payoff amount on nearly half of the files. At the very least, it demonstrates the potential unreliability of looking solely at the deal files to establish a consistent policy or practice."

Nor, the trial court concluded, did the rest of the sampled files prove plaintiffs' assertion Orange Coast had a consistent policy or practice when its employees filled in Line 6.B of the sale contract. The court noted that even "[a]s to the remaining 17 [percent] or so of the sample files" in which the amount on line 6B *exceeded* the amount of the check sent to the lienholder, "a policy or practice [of including future interest on

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[1] Presumably this comment was an implicit reference to the fact Orange Coast's check to the lienholder was not the last word in the payoff transaction. Orange Coast submitted evidence proving that sometimes Orange Coast sent an additional check to the lienholder and other times the lienholder sent a refund to the customer.

line 6B] is not clear" "[g]iven the evidence of lenders returning overpayments in some cases,[2] along with the conflicting testimony of how payoff amounts were obtained for inclusion on the Sales Contracts[.]"

The trial court acknowledged there was certainly *some* evidence "of such a policy or practice," citing the fact "[nine] of the deal files revealed the existence of a Finance Department preprinted checklist with the notation 'if there is a trade[-]in, get . . . 10 day payoff.'" But the court noted that even in one of the files containing the checklist, "the payoff amount listed on line 6B is about $1000 *less* than the check written to pay off the loan." Consequently, "this checklist does not necessarily reflect what actually occurred." Moreover, the court stated, given "the limited use of that form as reflected in the files, the Court is hard-pressed to conclude that it actually was a policy routinely adhered to."

The trial court summarized its findings and conclusion as follows: "The lack of a consistent policy or practice makes this case unsuitable for class action treatment. While there likely are a number of individuals who may have legitimate UCL and/or CLRA claims, Plaintiffs have not provided the Court with a reliable way to determine on a group-wide basis which Orange Coast customers have such claims without making critical individualized inquiries -- i.e., what was the balance due on their loan on the day the Sales Contract was prepared, the source of that information, whether that source provided the balance due or a future payoff amount, and how the amount actually paid (after calculating refunds of excess amounts or additional payments made) was determined. In short, because Plaintiffs have not established that common issues predominate (*see Brinker*[, *supra*,] 53 Cal.4th 1004, 1021), the motion for class certification is denied."

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[2] Orange Coast submitted declarations from employees of the two financing companies also named as defendants stating that these companies refunded to customers any overpayment of finance charges on a trade-in.

II

DISCUSSION

"The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: 'Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification.' [Citation.] A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions. [Citations.]" (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089.)

Plaintiffs level all three charges against the trial court's certification order here, challenging the sufficiency of its evidentiary support and the criteria and legal assumptions on which it rests. None of these challenges succeeds.

A. *Substantial Evidence Supports the Order Denying Class Certification*

The trial court denied class certification based on its finding that individual issues, rather than common issues, predominate. "The 'ultimate question' the element of predominance presents is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.] The answer hinges on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.' [Citation.] . . . 'As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.' [Citations.]" (*Brinker*, *supra*, 53 Cal.4th at pp. 1021-1022.)

"Predominance is a factual question; accordingly, the trial court's finding that common issues predominate generally is reviewed for substantial evidence.

[Citation.] We must '[p]resum[e] in favor of the certification order . . . the existence of every fact the trial court could reasonably deduce from the record. . . .' [Citation.]" (*Brinker*, *supra*, 53 Cal.4th at p. 1022.)

Plaintiffs' theory of recovery for class-wide violations of the UCL and CLRA was as follows: In every contract to finance a new vehicle purchase where the down payment included a trade-in subject to a lien, "Orange Coast asked for and inputted the trade[-in] payoff, rather than the balance owing" on the RISC. In the class certification motion, plaintiffs argued they can prove this theory of recovery for each class member by proving Orange Coast had a uniform practice of asking for and inputting the future payoff rather than the balance on line 6B.

Orange Coast challenged plaintiffs' strategy for "common proof" of class-wide statutory violations with its own proof that Orange Coast had no such uniform practice when filling in the balance information on line 6B. Given the lack of a uniform practice, Orange Coast argued, the only way to prove that line 6B of a RISC failed to disclose the requisite "prior credit or lease balance" was to conduct an *individualized* inquiry on that RISC. Orange Coast contended the need for an individualized inquiry as to each class member demonstrated that individual issues predominated over common issues, making the case unsuitable for class treatment.

The trial court agreed. It found plaintiffs failed to prove Orange Coast had the claimed uniform practice and, consequently, failed to prove the crucial element of commonality. Substantial evidence supports that finding.

Orange Coast produced declarations and deposition testimony from former employees proving that they asked for and obtained trade-in balance information from various sources, including the customers themselves, and, thus, had no uniform practice for obtaining that information. In fact, Orange Coast disclaimed on the RISC any responsibility for the accuracy of the line 6B information as to the trade-in balance. Orange Coast's evidence demonstrated it had no way of knowing whether the amount

provided by whatever source was accurate; only the lienholder knew the exact balance on the trade-in date, and the lienholder would confirm the accuracy of the balance stated on line 6B when it either accepted Orange Coast's payoff check "as is," requested additional money, or refunded some amount.

While plaintiffs correctly asserted Orange Coast employees uniformly admitted asking for the "payoff" amount from whatever source, Orange Coast proved its employees had no shared understanding of what "payoff" meant. The employees did not all understand "payoff" to mean balance plus future interest, as plaintiffs defined the term.[3] Instead, Orange Coast employees used the terms "payoff" and "balance" interchangeably. Moreover, plaintiffs did not prove that by *asking* for the payoff, Orange Coast employees *received* a "future payoff," meaning the current balance plus some days' of future interest, as plaintiffs asserted.

The sampling of the deal files further disproved plaintiffs' claim Orange Coast had a uniform practice of inputting the "future payoff" rather than current loan balance on line 6B: In 45 percent of the sample files, Orange Coast sent a payoff check to the lienholder "that *exceeded* the amount on Line 6B." In other words, the amount on line 6B was insufficient to pay off the loan, presumably because it did not cover the interest that accrued from the date of the trade-in to the date of the payoff. And as for the 38 percent of the sample files in which the checks to lenders "were essentially the same as the amounts on Line 6B," the court found other evidence in the same files refuting plaintiffs' assertion of a "uniform practice" to include future, unaccrued interest in line 6B. In at least 16 of these files, Orange Coast issued a subsequent check to the lienholder to correct an underpayment in the initial payoff check.

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[3] The sales contract uses the terms "payoff" and "balance" interchangeably in reference to Line 6B. Line 6B has the heading "Less Prior Credit or Lease Balance." Further down the same page of the sales contract, the amount on line 6B is referred to as "the payoff amount[.]"

Curiously, plaintiffs try to turn the substantial evidence inquiry on its head by arguing the trial court erred in denying certification because plaintiffs submitted "sufficient" testimonial and documentary evidence "to grant class certification." Plaintiffs go to considerable lengths in their brief pointing to all the evidence that supports their factual contentions. As Orange Coast aptly responds, however, "[W]e do not ask on this appeal whether [the Myhands'] evidence may have been sufficient to support class certification, but confine our analysis to whether the record contains substantial evidence supporting the trial court's conclusion that 'individual facts and issues . . . requiring separate adjudication are more numerous and significant than the common issues.'" (*Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974, 992; *Quacchia v. DaimlerChrysler Corp*. (2004) 122 Cal.App.4th 1442, 1448-1449.) As explained above, a wealth of evidence here supported the trial court's finding that plaintiffs failed to establish that common issues predominate.

We note plaintiffs make a seeming last ditch effort to challenge the sufficiency of the evidence supporting the ruling by arguing the court relied on hearsay. Plaintiffs failed to raise that objection to the evidence in the trial court, thereby waiving the argument on appeal.

B. *The Trial Court Did Not Base its Order on Improper Criteria or Erroneous Legal Assumptions*

Plaintiffs' arguments that the trial court based its order on improper criteria and erroneous legal assumptions likewise fail.

Plaintiffs state their argument about "improper criteria" as follows: "The Myhands demonstrated that Orange Coast had a policy of always requesting payoffs, but the trial court based its class certification denial on improper criteria by focusing on the different sources of the payoff amount and the different amounts inputted by Orange Coast on line 6.B or purchase contracts."

Plaintiffs argue both the source of the payoff information and the exact amounts inputted into line 6B on each RISC are irrelevant to class certification. Plaintiffs contend the amount inputted into line 6B will ultimately be relevant to proving individual damages, but is not relevant to certification. In plaintiffs' view, the only relevant inquiry is whether Orange Coast had a uniform practice of *asking* for payoffs.

According to plaintiffs, Orange Coast's uniform practice of asking for a trade-in vehicle's payoff rather than its balance meant Orange Coast never received the balance information and, thus, never inputted the information statutorily required on the RISC. Instead, plaintiffs argued, Orange Coast always received and inputted the *future payoff* –the balance plus some additional days' interest – thereby violating the CLRA and UCL.

Plaintiffs' argument about "improper criteria" fails because it is based on a false premise: that plaintiffs proved Orange Coast had a uniform practice for obtaining and inputting balance information on line 6B, and that practice by necessity never resulted in accurate information as to balance. As already explained, the evidence on this key issue was conflicting and the trial court chose to believe Orange Coast's evidence. That evidence proved Orange Coast had no uniform practice for obtaining balance information and there is no way of determining from the Orange Coast's files alone whether the information on line 6B of any RISC is accurate. Plaintiffs are simply wrong in contending the trial court's "focus" on the different sources of the balance information and the balance amounts reflected on individual deal files is irrelevant to certification.

Finally, plaintiffs argue the trial court based certification denial on the "erroneous legal assumption" that "it would be too difficult to prove whether and how each class member was harmed because the source and the exact amount of the trade-in balance was unknown without further individualized inquiry." Again, plaintiffs argue that it is improper to deny certification because proof of damages will require individualized inquiries. But plaintiffs mischaracterize the nature of the individualized

inquiries underlying the court's finding that individual issues predominate. The court concluded proof of the claimed statutory violations will depend on individualized inquiries. That finding was based on substantial evidence and provided an undeniably sound basis for denying certification here.

We conclude the trial court did not abuse its discretion in denying plaintiffs' motion for class certification.

III

DISPOSITION

The order denying the motion to certify the class is affirmed. Respondents are entitled to costs on appeal.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.